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Mr. Craig Melodia
Assistant Regional Counsel
USEPA – Region 5
77 West Jackson Blvd. (C-29A)
Chicago, IL 60604-3590

Re: Ashland Lakefront Site ("Site") -- City of Ashland

Dear Craig:

Thank you for your courtesies when I reviewed documents at your offices on September 18, 2009. We have been able to review all responses to the Agency's 104(e) Request for Information and should soon be in a position to share with you our thoughts on allocation.

As we have previously discussed, we believe that there are several viable Potentially Responsible Parties (PRPs) at the Site including the two subject railroads and the City of Ashland (the "City"); our allocation report will also suggest additional PRPs for your consideration. Each of these parties should receive Special Notices of Potential Liability letters following issuance of the Record of Decision (ROD). With respect to the City, we understand it has argued that it should not receive a Special Notice on the grounds that it qualifies for certain liability exemptions given its mode of acquisition of a portion of the Site. Likewise, in its Response to the 104(e) Request for Information dated April 24, 2009, the City asserted that it may qualify for the exemption set forth in Section 101(20(D) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") by virtue of its purported "involuntary" acquisition of portions of the Site. *See* Response A.6(b).

The purpose of this letter is to articulate our understanding of these exemptions, to identify the facts relevant to the City's attempted application of these defenses in this case, and to explain why we respectfully disagree with the City's position that it qualifies for any such liability exemption. As described in greater detail below, the City does not qualify for any such asserted exemptions because its acquisition was not "involuntary" and indeed, even if it were, the City's own actions resulted in the release of hazardous substances at the Site. Moreover, EPA guidance requires that all PRPs receive Special Notice letters and the appropriate time to evaluate the City's asserted exemption is after, not prior to, issuance of such letters.

As you know, CERCLA § 101(20)(D), 42 U.S.C. 9601(20)(D), provides:

> The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign ....

Although not cited by the City in its 104(e) response, CERCLA §§ 101(35)(A)(ii) and 107(b)(3), 42 U.S.C. 9601(35)(A)(ii) and 9607(b)(3), provide a similar, yet separate statutory defense for governmental entities that acquire title to property "involuntarily" provided the other conditions of Section 107(b)(3) are satisfied.[1] *See City of Wichita v. Aero Holding*, 177 F. Supp. 2d 1153, 1169 (Defense under CERCLA § 101(35)(A) is separate from the statutory exception provided in § 101(20)(D)).

To qualify for an exemption under either CERCLA §§ 101(20)(D) or 101(35)(A)(ii), a threshold determination must be made that the acquisition was involuntary. "EPA interprets Congress' use of 'involuntary' in §§101(20)(D) and 101(35)(A) of CERCLA to refer to the same concept." *See* "Municipal Immunity from CERCLA Liability for Property Acquired through Involuntary State Action" (Oct. 20, 1995), at 5 ("1995 Guidance").

EPA guidance, as well as 40 C.F.R. § 300.1105, provide insight as to what constitutes an involuntary acquisition for purposes of these exemptions. EPA's Fact Sheet titled "The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities" (Dec. 1995) ("Fact Sheet") reads that an acquisition is involuntary if it meets the following test:

> The government's interest in, and ultimate ownership of, the property exists only because the actions of a non-governmental party give rise to the government's legal right to control or take title to the property. (emphasis added).

CERCLA provides a list of examples of involuntary acquisitions by government entities, including:[2] acquisitions following abandonment; bankruptcy; tax delinquency; escheat; and eminent domain. Other examples of involuntary acquisitions are identified in 40 C.F.R. § 300.1105 which provides:

> (a) Governmental ownership or control of property by involuntary acquisitions or involuntary transfers within the meaning of

[1] Section 107(b)(3) provides a defense for any person that can prove: (i) that the release or threat of release of a hazardous substance was caused solely by the act or omission of a third-party whose act or omission did not occur in connection with a contractual relationship with that party; and (ii) can establish that the party exercised due care with respect to the hazardous substance concerned and took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. For purposes of Section 107(b)(3), CERCLA § 101(35)(A)(ii), excludes from the definition of "contractual relationship" certain instruments where "the defendant is a governmental entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation."

[2] Sections 292.11(e)a-f and 292.23(2)(a)-(f), Wis. Stats., also provide examples of what kind of governmental acquisitions may qualify for a state level liability exemption from state environmental laws.

> CERCLA § 101(20)(D) or § 101(35)(A)(ii) includes, but is not limited to:
>
> (1) Acquisitions by or transfers to the government in its capacity as a sovereign, including transfers or acquisitions pursuant to abandonment proceedings, or as the result of tax delinquency, or escheat, or other circumstances in which the government involuntarily obtains ownership or control of property by virtue of its function as sovereign;
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> (2) Acquisitions by or transfers to a government entity or its agent (including governmental lending and credit institutions, loan guarantors, loan insurers, and financial regulatory entities which acquire security interests or properties of failed private lending or depository institutions) acting as a conservator or receiver pursuant to a clear and direct statutory mandate or regulatory authority;
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> (3) Acquisitions or transfers of assets through foreclosure and its equivalents (as defined in 40 C.F.R. § 300.1100(d)(1)) or other means by a Federal, state, or local government entity in the course of administering a governmental loan or loan guarantee or loan insurance program; and,
>
> (4) Acquisitions by or transfers to a government entity pursuant to seizure or forfeiture authority.

EPA's 1997 "Policy on Interpreting CERCLA Provisions Addressing Lenders and Involuntary Acquisitions by Government Entities" (June 30, 1997) ("1997 Guidance") embraces this test and adopts the provisions of 40 C.F.R. § 300.1105 as applicable to the interpretation of CERCLA §§ 101(20)(D) and 101(35)(A)(ii).

Case law establishes that where a governmental entity purchases property, the acquisition is not "involuntary", even if such purchase was for public purposes. In *United States v. Occidental Chemical Corp.*, 965 F. Supp. 408 (W.D.N.Y. 1997), the City of Niagara Falls argued that its purchase of a portion of the infamous Love Canal property to build roads and a park was "involuntary" because its purchase was to fulfill functions that a sovereign must perform. The United States District Court rejected this argument, noting that the City's definition was inconsistent with Congressional intent in enacting CERCLA, did not satisfy the plain meaning of the word involuntary, and was not one of the types of acquisitions contemplated by Congress. 965 F. Supp. at 413. Further, the court noted that "[s]ince all municipal purchases are made for the benefit of citizens, the City's construction of the word involuntary would cause the exception to swallow the rule." *Id.* See also *City of Wichita v. Aero Holdings*, 177 F. Supp. 2d 1153, 1162,

1168-69 (D. Kan. 2000)(City's voluntary purchase of property upon which it operated a bus barn was not "involuntary" even though the purchase agreement specifically stated the purchase was in lieu of condemnation and made for public purposes).

Based upon our understanding of how the City acquired portions of the Site, its acquisition was not "involuntary." Rather, its acquisition was made voluntarily and its interest in the property arose because it chose to acquire the property without any legal compulsion to do so -- its interest in the property did not arise only because of the actions of Schroeder Lumber. Ashland County (not the City), acquired title to portions of the Site via tax delinquency foreclosure proceedings in 1939 after it sued Schroeder Lumber.[3] *See Ashland/NSP Lakefront Site PRP Investigation Report* (June 20, 2006)("PRP Report"), at 15, fns. 31 and 39. See also City's CERCLA §104(e) Response, Exh. A.6. In 1942, the City subsequently purchased the property from the County for $1.00 via a Quit Claim Deed. *See* PRP Report, Exh. 3; City's CERCLA § 104(e) Response, Exh. A.6.[4]

Accordingly, the City did not obtain title to portions of the Site through one of the mechanisms enumerated in the relevant state or federal statutes or guidance as "involuntary." Instead, the City, like the governmental entities in *U.S. v. Occidental Chemical Corp. and Wichita v. Aero Holdings* voluntarily purchased the property and had no legal compulsion to do so. Therefore, the involuntary acquisition liability exemptions are inapplicable.

Even if the City's acquisition could be construed as "involuntary" -- a strained construction of the term we believe -- the language of the exemptions and the relevant guidance establish that these exemptions are neither unconditional nor absolute. To maintain eligibility for an exemption under CERCLA §§ 101(35)(A)(ii) and 107(b)(3), the City must also demonstrate that it exercised due care with respect to the hazardous substance concerned and took precautions against foreseeable acts or omissions relating to the hazardous substance. *See* CERCLA § 107(b)(3)(a)-(b).

Further, to preserve eligibility for the exemption under CERCLA § 101(20)(D), the party claiming to be exempt cannot have itself caused or contributed to the release of hazardous substances at the Site. CERCLA § 101(20(D) specifically provides that:

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[3] Even though the County may have acquired portions of the Site involuntarily, the County may not qualify for any liability exemption depending upon the nature and extent of its activities on the property during its possession. Historical evidence confirms that the County controlled the property for a period of time, took steps to protect the property, and demolished some of the Schroeder Lumber buildings during its possession. If such activities caused or contributed to releases at the Site, the County would also be a potentially responsible party.

[4] Just as a sale of a contaminated property at a depressed price can constitute a "disposal," so too can acquisition of a waterfront parcel for a nominal price evidence a knowing assumption of contaminated conditions. [Consider whether to cite City reports/minutes, etc., showing City knew the area was blighted.] The City should not obtain a "double benefit."

> The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.[5]

The guidance confirms that "acquiring property involuntarily does not categorically or permanently insulate a government entity from CERCLA liability." (emphasis added). 1995 Guidance, at 2. Similarly, the guidance establishes that these exemptions "do not shield government entities from any potential liability that they may have as 'generators' or 'transporters' of hazardous substances under CERCLA." Fact Sheet, at 2.

Based on the historical record of the action and inaction of the City at and in the area of the Site prior to and during its ownership of a portion of the Site, the City cannot maintain eligibility for any liability exemption.[6] As set forth more fully in the PRP Investigation Report and Addenda thereto, the City's activities/inactivities that have caused or contributed to the contamination at the Site include:

- allowing the operation of an uncontrolled waste disposal location at the Site beginning in the 1940s;
- constructing in the 1950s and expanding in the 1970s the former wastewater treatment plant ("WWTP");[7]

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[5] Wisconsin law provides a similar exception to the exemptions where the governmental entity that involuntary acquired the property otherwise contributes (through action or inaction) to the contamination. *See* § 292.11(e)2 and § 292.23(3), Wis. Stats.

[6] It is our understanding that the City previously sought some sort of liability clarification/no further action letter from the WDNR as it relates to historic solid waste disposal activities at the Site. *See* May 19, 2000 Request for No Further Action Determination prepared by Earth Tech and submitted to J. Dunn, WDNR. This request did not seek a determination as to whether the City qualified for an exemption from liability. To our knowledge, WDNR made no such determination but instead, by letter dated August 30, 2001, indicated that no further action was necessary at that time to address the solid waste and associated contamination.

[7] The engineer (Greeley & Hansen) and the contractors and subcontractors retained by the City to perform work in connection with the WWTP (*e.g.*, F.H. Paschen, S.N. Nielsen) are also potentially responsible parties. *See Kaiser Aluminum & Chem. Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9th Cir. 1992)(contractor who unknowingly moved contaminated soil from one area of a site to another was PRP under CERCLA §§107(a)(2) and (4)); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988)(party that moves hazardous waste intra-site is liable as arranger); *Geraghty and Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5th Cir. 2001)(consultant/engineer can be held liable where it exercises control of the activity causing/contributing to the pollution).

- transporting and disposing contaminants at the Site excavated during the extension of Ellis Avenue in the mid-1980s;[8]
- pumping contaminated water from the WWTP to the impacted portion of the Bay as late as 1997; and,
- installing and maintaining surface and subsurface drainage features and transport mechanisms resulting in the discharge of hazardous substances.

The City has the burden of proving the applicability of any liability exemption by a preponderance of the evidence. *See* Fact Sheet, at 2. Resolution of whether or to what extent the City can satisfy this burden is premature. EPA guidance provides that "RI/FS and RD/RA special notice letters should be sent to all parties where there is sufficient evidence to make a preliminary determination of potential liability under § 107 of CERCLA." *See Interim Guidance on Notice Letters, Negotiations, and Information Exchange* (Oct. 1987), at 18. We believe that there is sufficient information in the record to establish that the City is a potentially responsible party that is not exempt from liability and as such should be a special notice recipient.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

MICHAEL BEST & FRIEDRICH LLP

David A. Crass

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[8] The contractors and subcontractors involved with the extension of Ellis Avenue (e.g. Wilhem Engineering and James Peterson & Sons, Inc.) are also potentially responsible parties. *See*, n. 7.